STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Murphy, P.J., and Sawyer and Bandstra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

EDMUND MCGEHEE BARBEE,

Defendant-Appellant.
_____/

Supreme Court No. 123491

Court of Appeals No. 243912

Lower Court No. 01-008641-FH

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to hear this case under MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL COURT ERR IN SCORING OFFENSE VARIABLE 19 OF THE LEGISLATIVE SENTENCING GUIDELINES WHERE MR. BARBEE DID NOT INTERFERE OR ATTEMPT TO INTERFERE WITH THE "ADMINISTRATION OF JUSTICE" BY PROVIDING A FALSE NAME AT THE TIME OF ARREST, AND DID TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL, BY FAILING TO OBJECT TO THE SCOPE OF THE STATUTORY LANGUAGE AT THE TIME OF SENTENCING?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant Edmund Barbee pled guilty to OUIL third offense, MCL 257.625, on October 26, 2001, in the Grand Traverse County Circuit Court. On November 30, 2001, the Honorable Thomas G. Power sentenced Mr. Barbee to a term of 29 to 60 months imprisonment.

The plea bargain provided for dismissal of a connected charge of driving with a suspended license and a third habitual offender notice (13a).

At sentencing, defense counsel objected to the scoring of Offense Variable 19 of the statutory sentencing guidelines on the ground that Mr. Barbee's act of providing a false name did not actually interfere with the administration of justice (14a-15a). The trial court upheld the scoring (17a).

In a post-conviction motion for resentencing, Mr. Barbee argued that Offense Variable 19 did not apply to pre-arrest conduct that did not interfere with judicial proceedings. The trial court again upheld the scoring (27a-30a) (Order, 9a).

The Court of Appeals denied leave to appeal (10a).

In response to Mr. Barbee's request for leave to appeal in the Michigan Supreme Court, the Court initially held the application in abeyance pending the Court's decision in People v Deline (Docket No. 123079) (11a). By subsequent order dated November 26, 2003, the Court vacated the abeyance order and granted leave to appeal (12a).

I. **THE TRIAL COURT ERRED IN SCORING OFFENSE VARIABLE 19 OF THE LEGISLATIVE SENTENCING GUIDELINES WHERE MR. BARBEE DID NOT INTERFERE OR ATTEMPT TO INTERFERE WITH THE "ADMINISTRATION OF JUSTICE" BY PROVIDING A FALSE NAME AT THE TIME OF ARREST, AND TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL, BY FAILING TO OBJECT TO THE SCOPE OF THE STATUTORY LANGUAGE AT THE TIME OF SENTENCING.**

Mr. Barbee is entitled to resentencing because the statutory sentencing guidelines were misscored under Offense Variable 19. The guidelines should have recommended a range of **12 to 24 months**, not 14 to 29 months (Sentencing Information Report, 8a). The sentence imposed, a term of 29 to 60 months imprisonment, will represent a departure from the corrected guidelines range with no articulated departure reasons. Accordingly, Mr. Barbee is entitled to resentencing. MCL 769.34(10)&(11).

This issue was raised below at the time of sentencing. Defense counsel objected to the scoring of ten points under Offense Variable 19 on the theory that Mr. Barbee's act of giving a false name to the police did not actually mislead the officers (14a-15a). MCR 6.429(C) (contemporaneous objection required at sentencing). Further objection to the variable was made by means of post-conviction motion for resentencing, at which time appellate defense counsel argued that the statute did not apply to conduct that occurred at the time of arrest and before the initiation of judicial proceedings (24a-25a). MCL 769.34(10) (objection to guidelines scoring may be raised by post-conviction motion).

If the Court finds, despite both objections, that the error was not adequately preserved, see People v McGuffey, 251 Mich App 155; 649 NW2d 801 (2002), lv den 468 Mich 859 (2003)

(objection must be made at time of sentencing or waived), and if the Court does not find plain error, People v Kimble, 252 Mich App 269; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003) (plain error where inapplicable variable scored), it should find ineffective assistance of counsel based on trial counsel's failure to properly raise and preserve this issue at the time of sentencing. People v Harmon, 248 Mich App 522; 640 NW2d 314 (2001) (court may review counsel's failure to properly preserve guidelines challenge). *See also,* Glover v United States, 531 US 198; 121 S Ct 696; 148 L Ed 2d 604 (2001) (attorney's failure to argue proper guidelines scoring may satisfy prejudice prong for claim of ineffective assistance if sentence exceeds the corrected range by *any* amount).

In reviewing a challenge to the scoring of the statutory sentencing guidelines, the Court applies de novo review to questions of statutory interpretation. People v Libbett, 251 Mich App 353, 365; 650 NW2d 407 (2002). *See also,* People v Hegwood, 465 Mich 432, 436; 636 NW2d 127 (2001).

Mr. Barbee was assessed ten points under Offense Variable 19 for interfering or attempting to interfere with the administration of justice. Offense Variable 19 provides:

> **Offense Variable 19, scoring**
>
> Sec. 49. Offense Variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points
>
> (b) The offender used force of the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice . . . 15 points

> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice ..... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice 0 points
> [MCL 777.49.[1]]

At sentencing, trial counsel objected to the scoring of this variable on the ground that Mr. Barbee's act of verbally[2] providing a false name (viz. giving the name of his brother) did not actually mislead the officers:

> [DEFENSE COUNSEL:] Well, I don't think there was any chance of that happening. Shortly after he did say that he said to the officer, arrest me, I'm drunk. Then, his fiancé, who was with him, indicated to the officer his true name. Granted it wasn't Ed who gave him the true name, but there was no way he was going to get out of that situation by telling the officer he was his brother. [14a.]

Defense counsel added that Mr. Barbee's "true identity was learned shortly after giving a false name [and] he also asked to be arrested judge" (15a). Mr. Barbee's "wallet was in his back pocket" (15a-16a).

The prosecutor argued that the misinformation could have posed a problem because "he could have bonded out [of jail]. And it has happened in the past where people bonded out and we go and arrest someone who we're not supposed to be arresting" (15a).

The trial judge concluded that Offense Variable 19 was properly scored based on Mr.

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[1] MCL 777.49 was amended twice after the date of Mr. Barbee's offense, but neither set of amendments addressed the ten-point category. *See*, 2001 PA 126; 2002 PA 137.

[2] Mr. Barbee indicated at the time of sentencing that it was a verbal statement rather than a "paper form" of false identification (16a). The trial court accepted this representation (16a). The presentence report is not entirely clear on the point. It indicates that the officers effectuated a traffic stop and identified Mr. Barbee "as being Edmond McGehee Barbee, Jr." They detected the odor of alcohol on his breath and requested a driver's license. At this point, Mr. Barbee "supplied the officers with a false identity and stated that his name was Christopher Noble Barbee" (32a).

Barbee's act of providing a false name to the officers:

> [THE COURT:] I'm going to rule that that was an interference with the justice system and administration of justice by misleading the officer as to who the person was for the purpose of avoiding a LEIN being run on him and discover[ing] who he was and he wasn't supposed to be driving, for example, it might be for other reasons.
>
> In any event, we are going to score that as ten points. [17a.]

Mr. Barbee's also challenged the application of Offense Variable 19 by way of post-conviction motion for resentencing. He argued that the statute did not apply to conduct occurring at the time of arrest because the conduct did not interfere with judicial or court proceedings (24a-25a). The trial judge disagreed, concluding that the words "administration of justice" should be construed more broadly than the phrase "obstruction of justice," and the administration of justice begins with the police investigation and ends with the completion of probation or parole:

> [THE COURT:] The argument is made that "interference with the administration of justice" really should be read as being "obstruction of justice." Now, "obstruction of justice" is a criminal offense having certain specific elements and requirements to establish and giving a false name to a police officer would – and indeed many other things that interfere with investigation and administration of justice would not be within the limited scope of the crime of obstruction of justice. And it is argued, however, that the phrase "administration of justice" or "interfering with the administration of justice" should be read as being "obstruction of justice."
>
> I think Mr. Cooney's [assistant prosecutor] right, that "obstruction of justice" is a term of art and a well-known one and if the drafter of this statute had wanted to have it limited only to things that would constitute obstruction of justice, then it could have been written that way. It wasn't, it was written with a different phrase, 'interfering with the administration of justice," and applying just the normal – the normal understanding to these words, the administration of justice commences no later than a police investigation and doesn't finish until the person has completed – has completed their probation

> or parole, if any. And it seems to me that if they use force or the threat of force to interfere with the administration of justice, you have the 15 points, and if they do it in some other way, such as misrepresenting a name in order to deceive an investigating officer that that would be interfering with the administration of justice in some other way and, therefore, warrants the ten points. [28a-29a.]

Without comment, the Court of Appeals denied leave to appeal (10a).

This Court should reverse. Offense Variable 19 should *not* have been scored in this case. The variable does not apply to conduct occurring *before* the initiation of criminal proceedings, and it does not apply to conduct that held no potential to mislead the arresting officers.

Mr. Barbee's conduct did not interfere with, or attempt to interfere with, the "administration of justice." The Legislature has not defined the term "administration of justice," but case law defining this term in similar situations strongly suggests that interference with the administration of justice means interference with court or judicial proceedings.

The criminal analogue to the "interference with the administration of justice" language of OV 19 is the crime of obstruction of justice. "Obstruction of justice is generally understood as an *interference with the orderly administration of justice*." People v Thomas, 438 Mich 448, 455; 475 NW2d 288 (1991) (emphasis added). And "interference with the orderly administration of justice" is behavior that affects the affairs of a court: "impeding or obstructing those who seek justice in court, or those who have duties or powers of administering justice therein." Id. (quoting People v Ormsby, 310 Mich 291, 300; 17 NW2d 187 (1945). *See also,* People v Jenkins, 244 Mich App 1, 15; 624 NW2d 457 (2000) (obstruction of justice is interference with the administration of justice, listing common law offenses that meet this definition and finding the act of creating false and misleading documents for grand jury investigation constitutes obstruction of justice); People v Tower, 215 Mich App 318, 320; 544 NW2d 752 (1996) (coercion of witnesses is one common form of obstruction of justice); People v Vallance, 216

Mich App 415; 548 NW2d 718 (1996) (intimidation of witness in judicial proceedings is obstruction of justice).

In United States v Aguilar, 515 US 593; 115 S Ct 2357; 132 L Ed 2d 520, 518 (1995), the United States Supreme Court concluded that the federal obstruction of justice statute, 18 USC § 1503, which requires that the defendant obstruct the "due administration of justice," refers to conduct undertaken "with an intent to influence judicial or grand jury proceedings." The Aguilar Court held that lying to a FBI agent about an investigation not connected with a grand jury inquiry did not constitute the crime of obstructing the due administration of justice. 132 L Ed 2d at 529.

In People v Giacalone, 16 Mich App 352, 357; 167 NW2d 871 (1969), addressing the factors to be considered in reviewing a motion for bond pending appeal, the Court of Appeals directed trial courts to consider the "risk to the proper *administration of justice"* (emphasis added). The Court provided examples of conduct interfering with the administration of justice, including "interference with 1-man grand juror's power to enforce his orders" and "threats to and intimidation of witnesses." 16 Mich App at 357 n 14. The Court noted that the defendant, a reputed member of the Mafia, had not engaged in any form of "obstruction of justice." Id at 361.

Clearly, case law equates obstruction of justice with interference with the administration of justice. Case law also holds that the act of interfering with police officers *prior* to the initiation of court proceedings or a grand jury investigation does not constitute the crime of obstruction of justice. *See also*, People v Thomas, supra (making of false statement in a police report in support of arrest warrant does not constitute obstruction of justice).

If the Court looks to when the "justice" system begins, it will find that for criminal matters the justice system begins with the filing of formal charges or the initiation of formal

proceedings. The United States Supreme Court held with reference to the Sixth Amendment right to counsel that the "initiation of criminal proceedings . . . is the starting point of our whole system of adversary criminal justice." Kirby v Illinois, 406 US 682; 92 S Ct 1877; 32 L Ed 2d 411, 418 (1972). Reflecting on the *administration* of justice, the Supreme Court stated, "The right to the assistance of counsel . . . is indispensable to the *fair administration of our adversarial system of criminal justice."* Maine v Moulton, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481, 491 (1985) (emphasis added). *See also*, People v Tracy, 186 Mich App 171; 463 NW2d 457 (1990) (investigatory step of obtaining a search warrant not part of "criminal prosecution").

The common meaning of the words "administration" and "justice" also strongly points to the conclusion that their use in tandem describes justice as administered by a court. Where the Legislature "has not expressly defined terms used within a statute," a reviewing court "may turn to dictionary definitions to aid [its] goal of construing those terms in accordance with their ordinary and accepted meanings." People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999). "Administration" has been defined as "the management of any officer, employment, or organization." Random House Unabridged Dictionary of the English Language (1971 ed). "Justice" has been defined as the "maintenance or administration of what is just by law, as by judicial or other proceedings: *a court of justice,"* and as the "judgment of persons or causes by judicial process: To administer justice in a community." Id. (emphasis in original).[3]

In People v Deline, 254 Mich App 595, 597; 658 NW2d 164 (2002), lv gtd 468 Mich 942 (2003), lv vacated and decision held in abeyance pending People v Barbee (Docket No. 123491),

[3] *See also*, Black's Law Dictionary (7th ed), defining justice as the "fair and proper administration of laws." While one might argue that the police "administer" the laws through the arrest process, the definition of "justice" found in Black's Law Dictionary includes reference to the "fair and proper" administration of the laws. This points to the judicial process, rather than the investigatory process, because the judicial process places special emphasis on impartial decision making, due process, equal protection, etc.

671 NW2d 886 (2003), the Court of Appeals looked to dictionary definitions and similarly concluded that the ten-point assessment under Offense Variable 19 requires interference with court or judicial proceedings:

> "Interference with" justice is equivalent in meaning to "obstruction of" justice. Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 611. Obstruction of justice "is a broad phrase that captures every willful act of corruption, intimidation, or force *that tends somehow to impair the machinery of the civil or criminal law*." *Id.* (emphasis added). Interference with the administration of justice thus involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved. See, e.g. *People v Coleman*, 350 Mich 268, 86 NW2d 281 (1957) (affirming conviction ob obstruction of justice involving witness tampering).

Common meaning thus strongly suggests that the administration of justice refers to courtroom proceedings, administrative hearings, matters pertaining to court or the execution of court documents and judgments.

Further, of the 22 offenses listed by Blackstone as constituting the crime of obstruction of justice, not one would apply in this case. *See*, People v Jenkins, supra at 15 (discussing 22 offenses); People v Vallance, supra (same). The closest example would be interference with "the execution of lawful process." But the Court of Appeals has held that the language "under any criminal process" refers to criminal court proceedings. People v Lawrence, 246 Mich App 260; 632 NW2d 156 (2001) (attempt to flee from police upon arrest *without warrant* does not constitute crime of escape under any criminal process).

Reference to the federal sentencing guidelines is also helpful. While the Michigan sentencing guidelines were never predicated on the federal sentencing guidelines, the federal sentencing guidelines include a similar guideline provision. Under the federal guidelines, an offender may receive a two level, upward adjustment for "Obstructing or Impeding the Administration of Justice." United States Sentencing Commission, Guidelines Manual § 3C1.1.

This adjustment applies where the "defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instance offense . . . ." Id. According to Application Note 5, the adjustment ordinarily does not apply to the act of "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense." USSG § 3C1.1, comment n. 5.

Granted, the federal sentencing guidelines do not limit the upward adjustment to conduct occurring during judicial or court proceedings, but the precise wording of the adjustment, as well as the application notes, actually support Mr. Barbee's argument. As the Court can see, the federal guidelines *expressly* include the investigatory stage. The Michigan sentencing guidelines do not. If this Court is left to the task of statutory construction of the Michigan guidelines, and considering Michigan's long history of treating obstruction of justice as a form of interfering with the administration of justice, and recognizing that obstruction of justice requires court or judicial proceedings under Michigan law, the Court would have to conclude that OV 19 was not meant to include the investigatory phase.

Moreover, the application notes in the federal sentencing guidelines seem to suggest a *de minimus* rule. Both Application Notes 4 and 5 of the federal sentencing guidelines provide a non-exhaustive list of conduct that should and should not be considered for purposes of the adjustment. A close review of the list demonstrates that some conduct is considered simply too insignificant or trifling to receive an upward adjustment. This conduct, not surprisingly, often occurs at the time of arrest:

> 5. Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1

(Acceptance of Responsibility)). However, if the defendant is convicted of a separate count of such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

> The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:
>
> (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
>
> (b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;
>
> (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
>
> (d) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));
>
> (e) lying to a probation or pretrial services officer about defendant's drug use while on pretrial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility). [USSG §3C1.1, comment n. 5.]

On the other hand, conduct that *may* be scored under the federal sentencing guidelines often involves some form of interference with judicial or court proceedings:

> 4. The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
>
> (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
>
> (b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) Escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§1510, 1511);

(j) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p).

> This adjustment also applies to any other obstructive conduct in response to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct. [USSG §3C1.1, comment n.4.]

In other words, the federal sentencing guidelines lend support for Mr. Barbee's twin arguments that Offense Variable 19 of the Michigan sentencing guidelines was never meant to encompass conduct occurring at the time of the arrest, and this variable was not meant to capture the act of providing a false name at the time of arrest when the officers were not actually misled.

In People v Deline, supra, the Court of Appeals recognized that OV 19 would have little force or meaning if all evasive and noncooperative behavior by defendants at the time of arrest was considered:

> Defendant here did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined. Instead, he tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood-alcohol content test. If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt. [254 Mich App at 597-598.]

See also, People v Bradford, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2003 (Docket No. 237494) (defendant's act of moving quickly through interior of house as police approached from outside, where no actual effort to resist arrest, not properly scored under OV 19; "If mere consideration of evading arrest satisfied OV 19, the sentence increase would apply to every defendant.") (33a-35a).

This Court should adopt the Deline reasoning. Mr. Barbee's act of providing a false name to the officers at the time of arrest did not amount to an attempted interference with the administration of justice because the officers were not acting pursuant to a court order, court

process or court proceeding. Moreover, and consistent with a *de minimus* rule of interpretation, the officers were not actually misled and the behavior should be considered too trifling or insignificant to be scored under OV 19. *See also,* People v Caver, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 236118) (flight from police not properly scored under OV 19) (36a-40a); People v Pickard, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 239274) (fleeing and eluding not properly scored) (41a); People v Shulick, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2003 (Docket No. 240343) (defendant's conduct of hiding from police as they went to his apartment hours after stabbing not properly scored) (42a-46a).

Accordingly, there was no interference or attempted interference with the administration of justice by Mr. Barbee. OV 19 should have been scored zero points. The error in scoring ten points was plain error, People v Kimble, supra, and it was not harmless where the sentence represents a departure above the corrected guidelines range of 12 to 24 months. Trial counsel was also ineffective in failing to argue the overall scope of the offense variable at the time of sentencing. People v Harmon, supra; Glover v United States, supra; US Const Amends VI & XIV; Const 1963, art 1, § 20.

For the above reasons, Mr. Barbee is entitled to resentencing.

SUMMARY AND RELIEF

Defendant-Appellant Edmund McGehee Barbee asks this Honorable Court to remand this matter for resentencing.

Respectfully submitted,

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